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# **SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM 1976**

**76-115**  
No. \_\_\_\_\_

\_\_\_\_\_  
**VINCENT J. BERNABEI,**

**Petitioner,**

**v.**

**UNITED STATES OF AMERICA,**

**Respondent.**

\_\_\_\_\_  
**PETITION FOR WRIT OF CERTIORARI**  
**To the United States Court of Appeals for the Sixth Circuit**

\_\_\_\_\_  
**JOHN KENNEDY LYNCH**  
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**Cleveland, Ohio 44114**

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v.

UNITED STATES OF AMERICA,

Respondent.

## PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on June 29, 1976.

## OPINIONS BELOW

The opinion of the United States District Court was filed August 25, 1975, which is included in the attached Appendix.

The Order of the United States Court of Appeals dismissing the Appeal of the Petitioner was entered on June 29, 1976. A copy of said opinion is included in the attached Appendix.

## JURISDICTION

The judgment of the Court of Appeals was entered June 29, 1976. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

## QUESTION PRESENTED

Was the Petitioner denied his Constitutional right to a fair trial when the trial Court excluded defense evidence of financial and domestic problems to prove that his failure to file an income tax return was not willful?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States 26 USC Section 7203.

## STATEMENT OF FACTS

Vincent J. Bernabei is a lawyer about 50 years of age who practices in Canton, Ohio. During the years here involved, 1965 through 1968, he was married and the father of five minor children. Finally, in 1968, after years of domestic turmoil which affected his financial condition, he was divorced. Subsequently, he remarried, and now has two minor children from the second marriage.

Petitioner in May, 1972 was convicted by a jury of four counts of wilful failure to file federal income tax returns and sentenced to four years imprisonment and fined \$20,000.00.

During the trial, the Court refused defendant the opportunity to introduce evidence of his marital and financial difficulties — by which evidence he would have offered proof that he had no evil motive for his failure to file

income tax returns and, therefore, was guilty of no *criminal* offense. The trial Court held that the evidence of the domestic and financial problems was not relevant to the issue of willfulness. On appeal, this Honorable Court sustained the finding of the District Court on February 28, 1973.

On May 29, 1973, the Supreme Court, in *United States v. Bishop*, 412 U.S. 346, clarified the law on proof of willfulness in a misdemeanor tax case, holding that the word "willfully" used in the tax statutes has the same meaning as in felony tax violations. Although the Bernabei case was then pending in the Supreme Court on a Petition for Writ of Certiorari, the Supreme Court denied his petition on October 9, 1973, and denied rehearing on November 19, 1973.

On July 25, 1975, Petitioner filed a motion to vacate judgment and sentence under 28 USC Section 2255. The motion was based on the decision of the United States Supreme Court in *United States v. Bishop*, 412 US 346, 93 S.Ct. 2008 (1973) holding that proof of willfulness in a tax misdemeanor violation requires the same quantum of proof as that in a tax felony violation and that the exclusion of his proffered evidence in the trial Court entitled him to a new trial.

The District Court denied the motion on August 25, 1975, and denied rehearing on September 11, 1975. On September 15, 1975, petitioner filed a notice of appeal from the judgment order of the District Court. After hearing, the Court of Appeals affirmed judgment of the District Court on June 29, 1976.



## REASONS FOR GRANTING WRIT

### I.

Since the decision of this Court in *United States v. Bishop*, supra, most of the Circuit Courts have been requiring proof of willfulness by positive evidence to establish that element of the offense beyond a reasonable doubt. Most trial Courts have been permitting the defense to present evidence which might explain reasons for failure to file income tax returns due to something other than criminal willfulness. In *United States v. Pohlman*, 75-1 USTC 9228 (CA 8), the Court held that in a trial for willful failure to file income tax returns the jury should consider the defense that defendant, a woman attorney, was so occupied with her professional and social duties that her failure to file was due to negligence and not criminal willfulness.

In *United States v. Bengiamina*, 74-2 USTC 9513, 499 F2 117 (CA8 1974), the Court reversed a conviction on the ground that the Court's instructions to the jury failed to properly define the meaning of the word "willfully" in a tax misdemeanor statute involving failure to file a tax return. The Court relied on *Bishop* supra in holding that the meaning of the word "willfully" in tax misdemeanor statutes has the same meaning as in a felony violation.

In *United States v. Sterling Berg* the United States District Court, District of South Dakota, Southern Division, 75-1 USTC 9198, the Court found the defendant not guilty on the grounds that the evidence showed that the defendant doctor was guilty of only negligence and carelessness in not filing his tax returns and that his behavior was not sufficient to show willfulness beyond a reasonable doubt. Obviously, Dr. Berg was allowed to present evi-

dence of carelessness and negligence to overcome any inference of willfulness.

Petitioner Bernabei proffered to the trial Court evidence of extreme financial and marital difficulties to overcome any inferences of willfulness in failing to file his tax returns, but the trial Court excluded this evidence.

### II.

It appears to be a matter of great public interest that, in prosecutions of taxpayers for willfully failing to file income tax returns, defendants be allowed to present evidence which might contradict proof of willfulness. It appears that this problem may be recurring frequently in the Circuits where this type of evidence is being excluded and it naturally is of great importance to defendants whose liberty is placed in jeopardy.

There is a conflict between the Court of Appeals on the question raised by this case. The Sixth Circuit Court of Appeals has held that the law established in *United States v. Bishop*, 412 US 346, is not applicable to cases such as this, whereas the Eighth Circuit Court of Appeals has held that the decision in the *Bishop* case does apply to willful failure to file tax cases.

In view of the importance of the question here involved, it is submitted that this Writ of Certiorari should be granted.

## CONCLUSION

In conclusion, for the reasons stated, the petitioner respectfully prays that this petition for Writ of Certiorari be granted.

Respectfully submitted,

JOHN KENNEDY LYNCH  
Attorney for Petitioner

## APPENDIX

### UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NO. 75-2239

UNITED STATES OF AMERICA,  
Respondent-Appellee,  
  
v.  
VINCENT J. BERNABEI,  
Petitioner-Appellant.

#### ORDER

(Filed June 29, 1976)

Before: PHILLIPS, Chief Judge, and EDWARDS and  
PECK, Circuit Judges.

Petitioner-appellant was found guilty by a jury of four counts of the misdemeanor of willfully failing to file income tax returns under 26 U.S.C. § 7203. On appeal, that judgment of conviction was affirmed. 473 F.2d 1385 (6th Cir.), *cert. denied*, 414 U.S. 825, 94 S. Ct. 130, 38 L.Ed. 2d 59 (1973). Subsequently, appellant moved for a new trial and appealed the order of denial entered in the district court, resulting in orders of affirmance. No. 74-2043, 6th Cir., entered December 19, 1974, and May 16, 1975, *cert. denied*, — U.S. —, 96 S. Ct. 63, — L.Ed.2d — (1975).

The instant motion is to vacate judgment and sentence under 28 U.S.C. § 2255. In the direct appeal hereinabove mentioned we rejected appellant's claim that "the trial judge erred in refusing to permit him to introduce evidence of marital and financial difficulties" because such evidence is "not relevant to the issue of willfulness as the term is used in the statute . . . ." In the present action, appellant contends that *United States v. Bishop*, 412 U.S. 346, 93 S. Ct. 2008, 36 L.Ed.2d 941 (1973), requires the granting of a new trial at which he should be permitted to offer the referenced evidence. We conclude that *Bishop* is distinguishable from the present case on the facts, and accordingly,

IT IS ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN,  
Clerk

THE UNITED STATES DISTRICT COURT  
THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

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CASE NO. CR72-63  
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UNITED STATES OF AMERICA,  
Plaintiff,

v.

VINCENT J. BERNABEI,  
Defendant.

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**ORDER**

(Filed August 25, 1975)

KRUPANSKY, J.

This is a proceeding to vacate sentence instituted pursuant to 28 U.S.C. § 2255.

Defendant, Vincent J. Bernabei, was convicted by a jury of five counts of willful failure to file federal income tax returns in May, 1972, sentenced to four years imprisonment and fined \$20,000. Immediately thereafter, defendant filed a Notice of Appeal and Motion for Stay of Execution of Sentence, which Motion was granted by this Court.

Defendant's conviction was affirmed by the Sixth Circuit Court of Appeals on February 28, 1973. *Bernabei v. United States*, 473 F.2d 1385 (6th Cir. 1973):

. . . appellant contends principally that the trial judge erred in refusing to permit him to introduce evidence



of marital and financial difficulties, as to which profers were made. It is his contention that in failing to file the returns in question he "had no evil motive . . . , but due to pressures and stress, neglected, without any criminal intent, to file his returns when due." It is here concluded that evidence of financial and domestic problems are not relevant to the issue of willfulness as the term is used in the statute under which appellant was charged and in the indictment, and that the evidence was properly excluded. *Id.* at 1385.

Defendant's petition for certiorari, 94 S.Ct. 130, and rehearing, 94 S.Ct. 556, were thereafter denied by the United States Supreme Court on October 9, 1973 and November 19, 1973 respectively. Subsequent thereto, defendant was remanded to the custody of the Warden of Mahoning County Jail on April 1, 1974.

On January 14, 1974, defendant moved this Court for a new trial on the basis of newly discovered evidence, pursuant to Rule 33, Fed. R. Crim. P., asserting certain improprieties in the selection of the jury in contravention of the Jury Selection and Service Act of 1968, as amended, 28 U.S.C. § 1861 *et seq.*, and this Court's local jury plan promulgated pursuant thereto. Defendant's subsequent Motion for Stay of Execution of Sentence was thereafter granted by this Court and defendant was released from the custody of the Warden of Mahoning County Jail on April 4, 1974 pending a final ruling on defendant's Motion for New Trial.

Pursuant to a full hearing on the merits of defendant's allegations, his Motion for New Trial was denied on May 22, 1974, at which time defendant was further Ordered to report to the United States Marshal to commence serving the sentence imposed by this Court on May 19, 1972. Immediately thereafter, defendant filed a Notice of Appeal

and Motion for Stay of Execution of Sentence, which Motion was granted by this Court on June 10, 1974.

Defendant's appeal of this Court's Order denying his Motion for a New Trial attempted to collaterally raise before the Sixth Circuit, once again, the propriety of this Court's refusal to admit evidence of his marital and financial difficulties as they related to the issue of willfulness. Defendant asserted therein that the intervening United States Supreme Court decision in *United States v. Bishop*, 412 U.S. 346 (1973), effectively overruled the Sixth Circuit's prior affirmance of his conviction herein, 473 F.2d 1385 (6th Cir. 1973).

On December 19, 1974, the Sixth Circuit Court of Appeals granted the Government's Motion to Dismiss defendant's collateral attack upon this Court's evidentiary ruling. This Court's Order of May 22, 1974 denying defendant's Motion for New Trial was thereafter affirmed by the Sixth Circuit on May 16, 1975.

Defendant's instant § 2255 application presents the identical issues he attempted to raise previously before the Sixth Circuit, namely, that the intervening decision of the United States Supreme Court in *United States v. Bishop*, 412 U.S. 346 (1973) overruled the Sixth Circuit's February 28, 1973, affirmance of his conviction herein.

Although the Court seriously questions defendant's status as "a prisoner in custody under sentence of a court" consistent with the jurisdictional prerequisites of 28 U.S.C. § 2255, *See Heflin v. United States*, 358 U.S. 415, 79 S.Ct. 451 (1959); *United States v. Hayman*, 342 U.S. 205, 72 S.Ct. 263 (1952); *McNally v. Hill*, 293 U.S. 131, 55 S.Ct. 24 (1934), the Court, desired to afford defendant an expeditious determination on his pending motion, and in the interests of justice, elects to proceed upon the merits of this cause.



Defendant was convicted by a jury in May, 1972, of five counts of willful failure to file federal income tax returns. His appeal therefrom was affirmed by the Sixth Circuit on February 28, 1973, and his petitions for certiorari and rehearing were subsequently denied by the United States Supreme Court on October 9, 1973 and November 19, 1973 respectively. The case upon which defendant relies, *United States v. Bishop, supra*, was decided by the United States Supreme Court on May 29, 1973.

It is obvious to this Court, as it was to the Sixth Circuit Court of Appeals in its refusal to permit defendant to collaterally prosecute this issue on appeal of this Court's denial of his Motion for New Trial, that the *Bishop* case, decided prior to defendant's petitions for certiorari and rehearing before the United States Supreme Court, was thoroughly reviewed therein prior to denial of said petitions, and found inapplicable.

The substance of defendant's present Motion having already been determined adversely to defendant by the United States Supreme Court and the Sixth Circuit Court of Appeals, said Motion is hereby denied.

Defendant's additional Motion for Stay of Execution of Sentence pending ruling on his Motion to Vacate Judgment is moot. Accordingly, It is ORDERED that defendant shall report to the United States Marshal within twenty (20) days of entry of this Order to commence serving the sentence imposed by this Court on May 19, 1972.

IT IS SO ORDERED.

/s/ Robert B. Krupansky  
United States District Judge

THE UNITED STATES DISTRICT COURT  
THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

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CASE NO. CR72-63  
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UNITED STATES OF AMERICA,  
Plaintiff,

v.

VINCENT J. BERNABEI,  
Defendant.

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ORDER

(Filed September 11, 1975)

Upon consideration, the motion of defendant Bernabei for reconsideration and/or rehearing of this Court's Order dated August 25, 1975 denying his motion to vacate sentence is hereby denied.

IT IS SO ORDERED.

/s/ Robert B. Krupansky  
United States District Judge